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fence chose not to locate or call any witness who had been connected with Office of Strategic Services. Id.

Defendant, convicted of conspiracy to obtain defense information, was not entitled to new trial for assertedly newly discovered evidence that his brother who had testified against defendant had assertedly been incompetent as witness by reason of mental condition which government allegedly failed to disclose, where defendant actually knew of brother's mental condition defendant was experienced psychiatrist and it was decided as matter of defense strategy not to subpoena or request production of medical reports or to put psychiatrist on stand. Id.

25. Double jeopardy

Indictment charging that defendant wilfully attempted to communicate and transmit documents relating to national defense to one not entitled to receive them, with reason to believe that they would be used to injury of the United States and to advantage of a foreign nation, would not be dismissed on ground that trial thereunder would constitute double jeopardy because defendant had been convicted under an indictment charging that she obtained possession of documents with specific intent that information be used to injury of the United States and to advantage of a foreign nation, since indictments involved different offenses. U. S. v. Coplon. D.C.N.Y.1949. 88 F.Supp 910.

§ 794. Gathering or delivering defense information to aid foreign government

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

(b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

June 25, 1948, c. 645, 62 Stat. 737; Sept. 3, 1954, c. 1261, Title II, § 201, 68 Stat. 1219.

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therefore, the findings as to the wrongful possession charge could not stand; however, because military judge treated each possession specification as multiplicitous with each introduction specification for purposes of sentence, accused's sentence was not enhanced by the failure to set aside the multiplicitous findings, and no relief in sentence was required. U.S. v. Miles, C.M.A. 1983, 15 M.J. 431.

43. — Misfeasance or malfeasance or wantonness appropriate

In view of seriousness of offense and fact that accused had, 12 days prior to instant offense, been convicted of another offense involving improper use of firearms, sentence to bad-conduct discharge, confinement at hard labor for one year

and forfeiture of all pay and allowances was correct and proper upon conviction for wrongfully discharging firearm under circumstances such as to endanger human life. U.S. v. Meade, ACMR 1985, 19 M.J. 894.

48. — Harmless or prejudicial error

Mistrial, on motion of accused, was required due to member's attendance at commandant's lecture on drug abuse during court-martial proceedings involving possession, transfer and sale of LSD, with commandant, who was the convening authority, stating that drug trafficking was intolerable in the military and that drug traffickers should be "out" of the service. U.S. v. Brice, CMA 1985, 19 M.J. 170.

§ 895. Art. 95. Resistance, breach of arrest, and escape

Notes of Decisions

Connection of offense with service §

1. Resisting apprehension—Generally

Price of guilty to resisting apprehension by German police officers who are not agents of foreign police officials who are not agents of the United States was not a violation of this section but was more appropriately chargeable under section 934 of this title governing disorders and neglects to the prejudice of good order and discipline in the armed forces. U.S. v. Seymour, ACMR 1984, 19 M.J. 608.

4. — Confinement

Where serviceman was being temporarily detained in connection with search of his room and of his person but he was not clearly notified that he was being taken into custody, and surrounding circumstances did not support conclusion that he had been apprehended prior to his flight from his room, he could not be found guilty of escape from custody. U.S. v. Garcia-Lopez, CMA 1983, 16 M.J. 229.

§ 905 Art. 105. Misconduct as prisoner

Notes of Decisions

1. Selective prosecution

Prosecution of accused for communicating with the enemy and assaulting American prisoner of war, based on conduct of accused after purportedly being captured by enemy forces in Vietnam, did not constitute impermissible selective prosecution despite contention that others who were suspected of similar offenses were not prosecuted upon repatriation where accused was repatriated long after the others and where there was no evidence of bad faith. U.S. v. Garwood, CMA 1985, 20 M.J. 148.

§ 906. Art. 106a. Espionage

(a) Any person subject to this chapter who, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any entity described in paragraph (2), either directly or indirectly, anything described in paragraph (8) shall be punished as a court-martial may direct, except that if the accused is found guilty of an offense that directly concerns (A) nuclear weaponry, military aerospacecraft or satellites, early warning

systems, or other means of defense or retaliation against large scale attack, (B) war plans, (C) communications intelligence or cryptographic information, or (D) any other major weapons system or major element of defense strategy, the accused shall be punished by death or such other punishment as a court-martial may direct.

(2) An entity referred to in paragraph (1) is—

- (A) a foreign government;
- (B) a faction or party or military or naval force within a foreign country;
- (C) a representative, officer, agent, employee, subject, or citizen of such a government, faction, party, or force.

(3) A thing referred to in paragraph (1) is a document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense.

(b)(1) No person may be sentenced by court-martial to suffer death for an offense under this section (article) unless—

- (A) the members of the court-martial unanimously find at least one of the aggravating factors set out in subsection (c); and
- (B) the members unanimously determine that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including the aggravating factors set out in subsection (c).

(2) Findings under this subsection may be based on—

- (A) evidence introduced on the issue of guilt or innocence;
- (B) evidence introduced during the sentencing proceeding; or
- (C) all such evidence.

(3) The accused shall be given broad latitude to present matters in extenuation and mitigation.

(c) A sentence of death may be adjudged by a court-martial for an offense under this section (article) only if the members unanimously find, beyond a reasonable doubt, one or more of the following aggravating factors:

- (1) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute.
- (2) In the commission of the offense, the accused knowingly created a grave risk of substantial damage to the national security.
- (3) In the commission of the offense, the accused knowingly created a grave risk of death to another person.
- (4) Any other factor that may be prescribed by the President by regulation under section 836 of this title (article 36).

(Added Pub.L. 99-145, Title V, § 634(a), Nov. 8, 1985, 99 Stat. 634.)

Literary References
War and National Emergency § 41
C.J.S. War and National Defense § 36.

§ 907. Art. 107. False official statements

Notes of Decisions

4. — Official status of statements

Accused was within the line of duty when he was on temporary assignment to a satellite Navy Relief Society office, and preparation of a standard informational form used in connection with request for financial assistance was a required function of his temporary duty assignment, but the salient issue in determining whether he was properly convicted of falsely signing an official document was not whether he was in "line of duty" status or had a "duty" to prepare the form.

Portion of sentence adjudging a fine was not illegal, although accused contended that he was not liable for multiplicity for findings another's name were not separate, offenses were statutorily separate and offenses were directed at different societal norms. U.S. v. Mease, NMCMR 1985, 20 M.J. 972.

12. Sentence and punishment

Portion of sentence adjudging a fine was not illegal, although accused contended that he was not liable for multiplicity for findings another's name were not separate, offenses were directed at different societal norms. U.S. v. Mease, NMCMR 1984, 19 M.J. 582.

not constitute impermissible selective prosecution despite contention that others who were suspected of similar offenses were not prosecuted upon repatriation where accused was repatriated long after the others and where there was no evidence of bad faith. U.S. v. Garwood, CMA 1985, 20 M.J. 148.